We might add however that the argument put forward by the second appellant in the court below would seem to have many loose ends. In his affidavit in opposition the second appellant alleged that there was an "oral appointment" by the respondent of one firm, Wah Sang Loong of No. 11, Jalan Silang, Kuala Lumpur as the distributor of the sanitary napkins of the Bangkok Company in March 1973. But it was revealed subsequently that that firm belonged to the second appellant and his two brothers.

It was also alleged by the second appellant that the 1973 agreement ceased to operate and was terminated by mutual consent in mid-1975 after the firm, Wah Sang Loong, began to experience difficulties due to high percentage of damage and high import duties of the goods. It was also because of these difficulties which led to the formation of the Malaysian Company to manufacture the same products. But according to clause 10 of the 1973 agreement the agreement was to operate for ten years and only after the expiration of ten years from the date of the agreement will either party have the right to give six calendar months' notice of termination. We find no evidence that the agreement was terminated orally or otherwise in mid-1975. In fact the only evidence of termination was by the respondent referred to in his affidavit affirmed on October 22, 1984, in that he had sent the notice of termination to the second appellant on February 21, 1984.

The fact that a mark is entered upon the register is *prima facie* evidence of the validity of the original registration and of the right of the registered proprietor to the exclusive use of the mark. See also *G.E. Trade Mark.*[1]

Section 45(1)(a) of the Trade Marks Act 1976 reads:

"The Court may on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the Register of any entry or by any entry made in the Register without sufficient cause or by any entry wrongfully remaining in the Register, or by any error or defect in any entry in the Register, make such order for making, expunging or varying such entry as it thinks fit."

This case can be viewed either as an entry made without sufficient cause or as an entry wrongfully remaining in the register. Since there is evidence on which the learned judge relied (with which we agree) to hold that the second appellant had fraudulently and without the knowledge and consent of the respondent altered the entry on January 28, 1974, the alteration should be expunged from the register.

We accordingly dismiss the appeal with costs and affirm the order of the learned judge.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.; H.S. Lim, Teo & Partners.*

MUSTAFA BIN OSMAN v. PATIMA BTE AHMAD

[O.C.J. (Wan Yahya J.) February 26, 1986]

[Malacca — Civil Suit No. 277/77]

Land Law — Claim for one-third share in land — Whether held on trust for plaintiff — Conflict of claims — Resolution of conflict — Whether land purchased exclusively for defendant's use or jointly with plaintiff — Counterclaim by defendant.

The subject matter of this case was land Lot No. 67, Town Area XXXVI, Malacca, registered in the name of the defendant, whose husband (Jalil) is the elder brother of the plaintiff by a different mother. The plaintiff, a lawyer's clerk, sought a declaration that one-third share in Lot 67 is held by the defendant on trust for him absolutely. He also sought an order that the defendant do execute a valid and registrable transfer of the said one-third share to him. The parties had enjoyed good relationship until this unfortunate episode. The story began in 1972, when the defendant signed the agreement for the purchase of Lot 67 from Pon binte Mohd. in the presence of an advocate and solicitor, the employer of the plaintiff. According to Pon's husband (D.W.1), a sum of $3,000 out of the selling price of $4,750 for the land was paid by Jalil. The remaining amounts were to be paid by instalments of $80 per month.

The plaintiff claimed that he had negotiated to buy the land for his own use. As he had no money, he had approached his brother, Jalil, for a loan to purchase the land. Jalil said that he had only $3,000 and so he suggested the land be bought jointly, with Jalil paying $3,000 and the balance to be paid by the plaintiff. The plaintiff said that the purchase price was agreed at $4,750 out of which $3,000 was paid in cash and the balance in instalments of $80 per month. The plaintiff called his three brothers to give evidence. The dispute rested upon the learned Judge's resolution of conflicting claims. The entire episode boiled down to one question of fact, *i.e.* was the land purchased by the defendant's husband exclusively for his wife's use or was it purchased jointly with the plaintiff?

Held, dismissing the plaintiffs claim with costs: (1) the plaintiff did not make the entire payment of $1,750 and

that the defendant had remitted several sums over and above the $3,000 initial payments;

(2) the compensation money for the squatter was paid by the defendant's husband;

(3) the defendant or her husband had not by their words or conduct admitted the plaintiff's claim over the land;

(4) the original entry of the plaintiff, P.W.4, P.W.5 and P.W.7 was with the consent of the defendant and her husband and they had been permitted to build the house and to plant trees. This should not give rise to an adverse inference against the defendant or her ownership of the land;

(5) attempts to subdivide the land did not imply an admission on the part of the defendant that a portion of the land was intended to be allocated to the plaintiff;

(6) having considered the whole of the plaintiff's case against that of the defendant and on the balance of probabilities, the court found that the plaintiff had not succeeded in showing that the land was purchased by the defendants with the intention of sharing one-third of its interest with the plaintiff;

(7) defendant's counterclaim dismissed, with no order as to costs.

Case referred to:

(1) *Wallington* v. *Townsend* [1939] 1 Ch. 588.

CIVIL SUIT.

Plaintiff in person.

S.C. Navarednam for the defendant.

Cur. Adv. Vult.

Wan Yahya J.: Mustafa bin Osman, the plaintiff, is the brother-in-law of Patima bte Ahmad, the defendant. Patima's husband, Jalil bin Osman, is the elder brother of Mustafa by a different mother. Patima herself was adopted by her father-in-law and was brought up in the same household.

The parties had enjoyed good relationship until this unfortunate episode. They now stand apart and at daggers drawn and it would appear that they now share nothing in common except the descendancy of the same father. Alongside each party in this dispute stands the other brothers whose loyalty and blind support for one or the other party is only too clear from their bitter evidence. Various efforts have been made by counsel of both parties to water down the hostility between the parties and to mitigate their disputes but nothing ever seemed possible. The situation between the parties at the moment had made it difficult for this Court to arrive at the factual conclusion based on the oral evidence of either party.

The story began in August 1972. The plaintiff was then employed as a lawyer's clerk in Bashir and Company, advocate and solicitor, and the defendant was then residing in Taiping. Her husband, Jalil, was stationed in Kedah as a Drainage and Irrigation Department officer. On one of the defendant's visits to the family house in Malacca the plaintiff and his brother. Jalil, discussed about the purchase of a land in Malacca. On February 28, 1972, by arrangement the defendant and her husband, Jalil, went to the office of Messrs Bashir and Company in which the plaintiff was employed and there in the presence of Mr. Bashir, the defendant signed the agreement for the purchase of lot No. 67 Town Area 36, the subject matter of this suit from Pon binte Mohd. According to Pon's husband, Capt. Ali bin Mohiddin (D.W.1), a sum of $3,000 out of the selling price of $4,750 for the land was paid by Jalil. The remaining amounts were to be paid by instalments of $80 per month.

The events that followed are in dichotomic versions. The plaintiff claims that he had negotiated to buy the land from Capt. Ali for his own use. As he had no money at that time he had approached his brother, Jalil for a loan to purchase the land. Jalil said that he had only $3,000 and so he suggested that the land be bought jointly, with Jalil paying $3,000 and the balance to be paid by the plaintiff. Finally, according to the plaintiff, the purchase price was agreed at $4,750 out of which $3,000 was paid in cash and the balance in instalments of $80 per month. The plaintiff admits receiving postal remittances from Jalil who was then stationed in Kedah but asserts that the sums were only $50 for 5 months and that according to him, was an advance by his brother in payment for his share of the purchase price.

The plaintiff went on to say that in 1974 when Jalil was transferred back to Malacca he helped Jalil to get a contract to build a house on this land and that he had even paid out of his own pockets $450 as compensation to a squatter who was staying on the land. According to plaintiff, he asked for his share of the land and the defendant's husband had agreed to give him 63½ feet long of the rear portion of this land. The plaintiff said he planted fruit trees on this portion and had been collecting coconuts from that part of the land. He added that in 1975 he had permitted his two other

brothers, Hussain and Mansor, to build their houses on this portion and as evidence of this he produced a declaration signed in 1977 which was, of course, made after the dispute had arisen between him and Jalil. Plaintiff continued that the portion was about to be demarcated when misunderstanding arose between him and his brother over his refusal to allow Jalil to exchange the land with another lot opposite to Lot 67. According to plaintiff he subsequently also purchased Lots 64 and 65 which were facing the defendant's land.

The defendant disputes this version. According to defendant and her husband, Jalil, the arrangement to purchase the land was made in response to her husband's disclosure that he was desirous of purchasing a piece of land in Kedah for about $8,000. The plaintiff on hearing this suggested that he should purchase a piece of land nearer to his own family house which was going at a cheaper price. One Capt. Ali in whose wife's name the land was then registered was prepared to part with it for about $5,000. There could be further bargaining of this price, of course. Jalil requested plaintiff to negotiate for a lower price and finally the plaintiff intimated through the post that the price had been whittled down to $4,750 and furthermore the payments could be made by remittances of $3,000 on signing the sale agreement and $80 a month thereafter. Upon receipt of this news the defendant travelled to Malacca. On the following day they went to the office of Messrs Bashir and Company in which plaintiff was then employed as a clerk. The defendant handed over the $3,000 in cash to Capt. Ali and signed the agreement which had been previously prepared. Then Jalil left the matter to be dealt with, or to use his own expression "this handling of matter" to the plaintiff. He claimed on his return to Kedah he remitted monies periodically through the post and in person whenever he returned home towards the payment of these instalments. He could only produce some but not all the remittances made. He said he had also paid $450 as compensation to a Chinese occupant of a *pondok* on that land. This transaction was also handled by the plaintiff. Soon after that the plaintiff moved into the vacant *pondok*. The other two brothers, Hussain and Mansor, also came to stay on the land. Plaintiff has since moved to his own house. Subsequently, when Jalil was transferred to Malacca he built a house on this land. His brothers, Hussain and Mansor who had been previously given permission and financial assistance to build their houses, continued to occupy a portion of the land. The dispute between him and his brothers arose when the plaintiff came to know about his intention to sell the land at a profitable price. Jalil asserts that he had bought the land for his wife and that at no time did he promise or agree to purchase the land jointly with the plaintiff.

It is not possible for me to go into details of this long and bitter episode of the conflicting claims. Perhaps it is just as unnecessary for me to go into the protracted accounts of their arguments, fist fights and legal suits against each other. What appear to be relevant in this conflict is that the relationship between the brothers have become so invidious and inimical now that none of their assertions can be accepted in this Court unless supported by truly independent and credible evidence.

All in all, the entire episode boils down to one question of fact *i.e.* was the land purchased by the defendant's husband exclusively for his wife's use or was it purchased jointly with the plaintiff?

Any logical conclusion on this matter can only be arrived at by establishing the intention of the parties at the time of purchase from the available documentary evidence as well as the antecedent and the subsequent conduct of the parties.

Towards establishing this intention, the plaintiff introduces the following arguments:

(a) *Defendant only paid $3,000*

In his evidence the plaintiff initially said that the defendant only paid $3,000 on signing of the agreement and that the balance of $1,750 was paid by him. However, when he was confronted during the cross-examination with several money order counterfoils he altered his stand on this subject by saying that out of the various money orders sent to him by the defendant $250 was remitted as a personal loan towards payment of his share of the purchase price. The rest he claimed was for the maintenance of defendant's mother and sister and towards meeting the expenses of Mansor's marriage. The plaintiff also produced a letter written by Jalil to him dated October 1, 1968, which speaks of $40 money order enclosed. The plaintiff asserts that the fact that the receipts of the instalment paid had remained in his possession is sufficient proof that he himself had made the payments. Both the defendant and her husband denied this claim. They maintained that the plaintiff was merely making payments on their behalf as Jalil was then in Kedah and they produced several money order counterfoils to show that several remittances were made.

In my opinion, plaintiff's mere possession of receipts of instalment payments is insufficient to prove this point especially so when every single receipt was clearly in defendant's name and the defendant was able to produce several money order counterfoils remitted to the plaintiff, some of which correspond exactly with the amount of monthly payments. The fact that they were unable to produce all the money order counterfoils does not materially affect the credibility of their story as Jalil had explained that some of the payments were made personally to the plaintiff and furthermore this transaction took place some six years prior to this hearing. Afterall, the plaintiff is in no better position since just like the defendant he was unable to account for all the payments he claimed he had made. The receipt (in defendant's name) which he produced in Court as exhibits All – A15 only add up to $1,560.00 as against $1,750 the sum which according to him was his share of the purchase price. Likewise, I consider the plaintiff's assertions that the other money orders were remittances for maintenance of his sister and mother has been sufficiently negated by Rokiah bte Osman (D.W.5), defendant's own sister no doubt, but nevertheless a more credible and independent witness unlike the plaintiff's other brothers. She had not been proved to have any proprietary interest in this case or in other ways involved in their various quarrels and fights. The letter (exh. P7) does not impress me as a corroborative evidence either. It was an isolated letter written in 1968 more than 4 years before the land transaction and against an entirely different family composition and relationship. In any event I am unable to accept an isolated letter written in 1968 as a piece of persuasive evidence when more recent letters (presumably at least a few accompanied the money orders) from 1968 to 1974 were never produced by the plaintiff.

I therefore find as a fact that the plaintiff did not make the entire payment of $1,750 and that the defendant had remitted several sums over and above the $3,000 initial payments.

(b) *Who Paid the squatter?*

The other point taken up by the plaintiff to support his claim is that he had paid a sum of $450 as compensation to a Chinese family to vacate a *pondok* on the land. In this respect, the balance of credibility hangs on plaintiff's evidence and that of his brother, Ismail, on one side and the defendant and her husband on the other side. Ismail's (P.W.4) evidence on this subject, however, was far from convincing. He was insistent at first that the sum paid was $500 and not $450 but changed his testimony quickly when confronted with the receipt. His testimony on the payment ran as follows:

> "There was a Chinese living on the land. He was asked to leave the land. I was there when the Chinese was asked to leave the land. Mustapha paid some money for him to get out of the land. I was there when the money was paid. About $500/- was paid. I am certain it was $500/-. I was there when this was paid. I saw the $500/- being paid. I do not know where Mustapha got the $500/- from."

This piece of evidence is completely different from the plaintiff's who said:

> "The $450/- was paid by me. $150/- was paid in June and $300/- in January."

The defendant, on the other hand, states that the money was paid by her husband on her behalf and she has her name on the receipt to back her claim. Even if the version of the plaintiff is to be believed the motive for such payment remains doubtful as the evidence that followed shows that the plaintiff and his other brothers went into occupation of the *pondok* immediately after it was vacated. The purpose of that payment even on the assumption that he had paid for it could have been for getting a place to live in rather than to fulfil his obligation. Over all these, there remains the unexplained inconsistency as to why he should be paying the full compensation as his assertion of interest on the land was only to the extent of one-third of the whole.

In view of the above, I accept the version of the defendant in preference to that of the plaintiff.

(c) *Allegation of intention to share land*

This, as it appears from the plaintiff's entire case, came from three sources: one in the form of oral admission made by the defendant's husband during discussion and before the purchase and the other also emanating from such discussion after the sale and the third came from a woman who overheard the conversation between the parties. The participants in both discussions were the plaintiff and his two other brothers and Jalil. I shall attempt to deal briefly with their relevant testimony on this subject.

P.W.4, Ismail bin Osman, said he knew about the intended purchase of the land by Jalil jointly with the plaintiff because he had heard it during a discussion. He then proceeded to give an account of the discussion which during cross-examination

was established to be held in Jalil's house after the land was bought and Jalil's house was built. This could only mean that such discussion took place after and not before the land was purchased. When confronted with this question during cross-examination he claimed that there were two discussions held – one before and the other after the purchase of the land, but strangely enought he gave no account of this first discussion and neither did the plaintiff. He was emphatic that the land was purchased from Capt. Ali himself. He was so sure about this transaction and said he wouldn't agree if defence counsel was to say it was registered in anybody else's name (the land was in fact registered in Capt. Ali's wife name). He was even prepared to give the exact purchase price of land which according to him was $4,800 and not $4,750. He claimed that he saw plaintiff writing a letter to Jalil to arrange for the first meeting when nothing was said about this by the plaintiff himself. Moreover, what he said was in clear contradiction to what another brother, Mansor (P.W.5) said that the meeting came about coincidently during one of Jalil's visit to Malacca.

His account about the second discussion was that the defendant and Jalil had agreed to the plaintiff's claim of his share by willingly measuring 63½ feet of land for the plaintiff and marking the spot by planting a mangosteen tree. The other brother, Mansor (P.W.5), confirmed that part of Ismail's version about what transpired on the second discussion but he said nothing about the first discussion beyond these words:

"As far as I know Mustapha and Jalil wanted to buy jointly. This problem is known to me earlier because it was discussed between us. Just before the purchase of the land I was staying in a rented house with Mustapha and Ali."

(*Quare:* It is not known why he used the word 'problem').

I have noted that in this particular area of allegation, the facts rest on the words of the plaintiff and his three brothers against those of the defendant and her husband. Of the three witnesses for the plaintiff, I consider Ismail to be an unreliable witness. He was the kind who would insist on the truth of things on which he was least sure of. For instance, he had insisted the compensation of $500 was paid in cash in his presence; that the land was registered in Capt. Ali's name; that the purchase price was $4,800 when other documents and facts undisputed by the plaintiff had clearly shown that the registered owner was Pon binte Ahmad and the purchase price of the land was $4,750 and that the compensation paid was $450. The other brother, Mansor (P.W.5), is a partial witness. His partiality stems not only from his loyalty to the plaintiff but also from his interest in perpetuating his stay on the land. In an obvious attempt to influence the Court's assessment of his credibility he used the expression 'Saya cakap benar' and even invoked the name of Allah when such reference was clearly uncalled for. He had built a house on the disputed land with plaintiff's blessing and is naturally interested that the outcome of this case should be favourable to the plaintiff. It is also interesting to note that although all three witnesses claimed that a mangosteen tree was planted at the 63½ feet demarcation line, no effort was made by the plaintiff to indicate the existence of this tree at the time of this trial and its distance from the extreme boundary of the land.

The third witness for the plaintiff is yet another brother, Ali (P.W.7). He also spoke about the first discussion which he said during cross-examination had taken place in the presence of the plaintiff's wife but he changed his mind promptly when it was put to him that the plaintiff was unmarried yet at that time. He also said that defendant and Jalil had marked out 63½ feet of land to plaintiff. According to him, the discussion about partition of land took place when they were in the house vacated by the Chinese. He said he knew about the compensation of about $400 being paid because he met the Chinese as the latter was returning from plaintiff's house after receiving the payment. This, of course, is at variance with plaintiff's version that $450 compensation was paid in two instalments of $150 in June and $300 in the following January.

In my view, this witness has a poor recollection of the transaction. His evidence on those taking part in the first discussion was not correct and of the second meeting his answers were often punctuated with such expression as 'I think she was there .... She may be in the kitchen .... She could be in the kitchen or some other place.' Likewise, he could not remember whether Ismail (P.W.4) and another brother, Hussain were present. It is notable that in this family line-up this witness shared the same mother as the plaintiff. The first witness and he shared a closer affinity to plaintiff rather than to his half brother, Jalil. This trait is discernible from his evidence in Court.

I am not prepared on their evidence alone to find that the defendant or Jalil had by their words

or conduct admitted to the plaintiff's claim over the land. On this argument I accept the evidence of the defendant and her husband that such an incident did not take place.

The third source of alleged admission according to plaintiff's case came from a washerwoman, Normah (P.W.3) who did all the washings for the brothers *i.e.* the plaintiffs, P.W.5 and P.W.7. She claimed that she overheard this conversation between the brothers denoting the land was bought by Jalil and plaintiff. This witness was subsequently recalled for further examination-in-chief during which time she added further evidence about seeing Capt. Ali (D.W.1) coming to collect money from plaintiff every month.

I am unable to accept this witness as truthful, credible or uninterested witness. She had been working for the plaintiff and two other brothers and she was also their neighbour. I find her evidence about over-hearing the conversation to be unbelievable. She claimed that she could overhear the conversation from within her house which was about 50 feet away and separated by an earth ditch and fencing. I have great doubts that sitting in another house 50 feet away she could have heard the conversation by the brothers who were in their own house. Anyway, she was not able to repeat the actual conversation nor could she say who and what was spoken. The evidence in Capt. Ali collecting the rent every month was neither mentioned by Capt. Ali nor the plaintiff and no effort was made to verify this from Capt. Ali during his cross-examination. Likewise, in cross-examination she claimed that during a feast she heard defendant talking about this in the presence of P.W.4 and P.W.5's wife but neither of these two ladies were called to support this serious allegation.

(d) *Adverse possession*

The plaintiff's evidence on this came from the same three brothers – P.W.4, P.W.5 and P.W.7. They supported the plaintiff's evidence that he had planted the trees and were collecting the fruits on the land.

As to the plaintiff's claim on his unrestricted enjoyment of the fruits of his labour, I find the evidence of this rather unconvincing. According to plaintiff's evidence, the planting of the trees took place after Jalil had conceded to plaintiff's claim to one-third of the land and after the 63½ feet demarcation line was agreed upon. These events occurred after Jalil had occupied his newly built house some time in 1975. So by November 1977 when the suit was filed those trees which the plaintiff claimed he had planted were hardly two years old. I take judicial notice that a normal coconut tree takes about 5 years; mangosteen tree 3 to 4 years; rambutan tree 4 to 5 years and a mango tree about 4 years to bear fruits. Therefore, if there was any fruit at all to be obtained from these trees, alleged to have been planted by the plaintiff and his other brother P.W. 4, P.W.5 and P.W.7), the fruits could only have been taken after 1978 at the earliest *i.e.* when the plaintiff and his other brothers were already in forcible occupation of the rear portion of the land and had filed a suit against the defendant. In short, at the time when the trees bore fruits the dispute between the brothers had already arisen and as the defendant at that time was no longer in a position to enforce his right over the area occupied by the plaintiff's other brothers, it could not be inferred that he had tacitly acknowledged their right over the land by allowing them the enjoyment of these fruits.

In this respect, the evidence of the defendant's husband appear to me to be more accurate and truthful. He said most of his fruit trees were already on the land when he bought it and that since they were on the land when he bought it and that since they were on the best of terms at that time he had no objection to his brothers, most of whom had occupied the portion with his permission, from sharing the fruits which came with the land. The imputation that plaintiff had unrestricted right to plant the trees and subsequently enjoyed the fruits of his labours is not, in my finding, true.

They also testified that the two of the brothers had built house on this part of the land. I accept this evidence. However, whether this act amounts to a concession by the defendant of his ownership over this part of the land will have to be considered by looking at the intention of the defendant in relation to his conduct.

It is undisputed fact that the brothers, P.W.1, P.W.4, P.W.5 and P.W.7, D.W.3 and Jalil, although born by different mothers were a close knit family at one time. In the past they were residing together in the same house or locality. Even when Jalil was away in Kedah, he could return periodically to stay with the others during his trips. The defendant is not only his wife but she was brought up by the same family. It was also agreed that when the father died Jalil, as the eldest, took a fatherly interest in the affairs of his brothers. When he bought the land, all

of them including the plaintiff came to stay in the *pondok* previously occupied by a squatter on the land. No doubt, they had the intention by some private arrangement as opposed to any strict legal agreement, to live together. They were prepared to operate as a team. They went into the land. They levelled it and they assisted each other in constructing the house. According to Jalil when he bought it he was still stationed in Kedah and he had no particular plans in view for the land. It is not disputed that Jalil even provided cash assistance to his two brothers, Hussain and Mansor for building their houses. As Jalil stated he gave them permission to stay as long as they wished to.

In support of his argument, the plaintiff produced declarations (exhibits A5 & A6) by Mansor (P.W.5) and Hussain (not called). The purpose of tendering these exhibits is obviously to indicate that both the brothers had acknowledged the plaintiff to be the owner of the disputed part.

I do not attach much value to this document and I do not think it has in any way strengthened the case of the plaintiff. The contents of this declaration is nothing more than what Ismail had said in his evidence, and, as far as Hussain's acknowledgment is concerned, Ismail himself had confessed Hussain is a labourer who was educated in Tamil and could not read Bahasa Malaysia which happens to be the language in which the declarations were made. No mention was made by the plaintiff or Ismail (P.W.4) that its contents have been explained to Hussain. In each case the declaration was made jointly by Hussain and the plaintiff; and Mansor and the plaintiff before another brother, Ali bin Osman (P.W.7). The first declaration was allegedly been made on June 29, 1977, but was stamped only on March 13, 1978. The second declaration by Mansor was unstamped. It is intriguing to note that the name 'Hussain' was deleted and the name 'Mansor' hand-written above it. Similarly the word 'asal' was added after the heading 'surat akuan'. Against all these amendments there appears only one signature which on sight appears to have been that of the plaintiff. I regard this exhibit as a mere scheme by the plaintiff to bolster his case and to commit his brothers into saying the things favourable to him as well as to prepare his ground work for demolishing their evidence if they should testify against him.

On this issue I find the explanation given by the defendant to be reasonably true and I find as a fact that the original entry of the plaintiff, P.W.4, P.W.5 and P.W.7 was with the consent of the defendant and her husband and that they have been permitted to build the house, to plant trees with such consent and that they have continued to stay on the land and to enjoy the fruits which were already on the land, with his blessings. I further find that his reluctance to exercise his right over the land after this dispute was brought about by his intention to avoid further violence and he did so in keeping with the advice of his solicitor. This argument, therefore, does not give rise to any adverse inference against him as to his ownership of the land.

(e) *Proposed sub-division and valuation*

Two witnesses, Muthu (P.W.2) and Haji Jalil (P.W.6) were called by the plaintiff to say that in 1975 the defendant had requested them to draw up a lay-out plan with a view to sub-division of lot No. 67 and in 1977 one Ismail Yassin had asked Haji Jalil (P.W.6), who happened to be a friend of the plaintiff, to value the land. The plaintiff had introduced this evidence in expectation of an inference being drawn to show defendant's acceptance of the existence of his right on the land.

Jalil (D.W.6) testified that he at one stage proposed to sell a portion of his land to one Razak and later to one Ismail Yassin. Razak who was called to give evidence confirmed that he wanted to buy the land. He said initially Jalil intended to sell the whole land but had suggested that his two brothers who were residing there be allowed to stay on. Razak said he envisaged complications from this arrangement and so he offered to buy the land if sub-division could be done up to a certain point without encroaching on the two houses occupied by P.W.5 and Hussain. He said further that he dropped the transaction because the proposed sub-division took such a long time. Defendant agreed that she wanted to sell the land later to one Ismail Yassin who stated that the sale was prevented by the plaintiff entering a caveat.

I have no reason to disbelieve the defendant and her witnesses on this matter and I conclude that attempts to sub-divide the land did not imply an admission on the part of the defendant that a portion of the land was intended to be allocated to the plaintiff.

Conclusion

The plaintiff in my impression is not a simple or an uninformed person or the kind who would disregard his legal right however remote. He had, according to the records in this Court and his own

evidence, worked as a solicitor's clerk in Messrs Aljeffery & Co. Kuala Lumpur, Messrs Allen and Gledhill, thereafter with Bashir & Company and at the time of the suit with Messrs Foo and Associates. He agreed that while with Bashir and Company he acted in the capacity of what could be described as the 'managing clerk'. In his own words, he described his proficiency in the legal field in these vain glorious terms:

"In my capacity as managing clerk I draft agreements; I draft pleadings and I prepare cases for trial and generally speaking I prepare the briefs under direction of Mr. Bashir".

He went on to say that once he had even made an application under section 56 of the Advocates and Solicitors Ordinance, 1947, to appear before a Judge in Chambers but had abandoned such application in the face of opposition by the Local Bar Committee.

In the light of his experience is he likely to be a person who would have made a mistake or ignored his legal rights? Even if the purpose of excluding his name from the sales agreement is to enable Jalil to raise a loan I can see no reason why he could not have extracted a written acknowledgment by a note or even mentioned them in his letter to his brother. As is shown in the evidence, he acted with artfulness and dexterity when he decided to protect his claim on the land by getting his two other brothers, Mansor (P.W.5) and Hussain (not called) to sign documents resembling those of statutory declaration. Why should he not inform Capt. Ali about his share of the land instead of telling him the opposite version that the monthly instalments had not arrived from his brother in Kedah? Likewise, he willingly and swiftly resorted to the use of legal process even against his own flesh and blood in order to assert what he believed to be his right. This attitude can be clearly seen from his evidence in cross-examination when he admitted to taking court actions against two persons from the Ayer Lileh Madrasah over harmless arguments relating to their refusal to accept his donation to the Madrasah; the issue of private summons against his other brother over purely family quarrel and an action for vacant possession against Hussain even when his interest over the land had yet to be determined.

The plaintiff's animosity against the defendant and her husband, his motive for revenge against Jalil is particularly noticeable when the latter was giving evidence. In spite of the services of a very competent lawyer, Mr. Thara Singh Sidhu, the plaintiff insisted that he be personally permitted to question his brother in the witness stand. When he was advised not to do so but to continue the cross-examination through his lawyer with leave to adjourn for further consideration and discussion as many times as he wished, the plaintiff discharged his counsel so that he could have his own back by questioning his brother.

In my view, it is improbable that the plaintiff has been misled either by the ignorance of the law or by his implicit trust in his brother from documenting his right, if any, in the document of sale or by other available means thereafter and that the veracity of his evidence has been seriously discoloured by his own hateful feelings against the defendant and her husband. I do not believe the relevant part of his evidence as the truth.

According to plaintiff the motive in Jalil's change of heart in acknowledging his right was attributable to his refusal to exchange another piece of adjacent land which he had purchased in 1975 with the defendant's land. This allegation was refuted by the defendant and her husband. Nevertheless, I found it hard to believe why the defendant who had just occupied his newly built house would want to swap his land and house for another vacant land on which he could not have any accommodation. It may be argued that the plaintiff's newly purchased land was more valuable than defendant's land and house, but if it was so why did the plaintiff not disclose this in his evidence. Accordingly I reject this imputation as untrue.

Having examined all these arguments in detail I shall now proceed to consider the evidence in this case *en masse* bearing in mind the character of the witnesses, their interest in this case, their family background and relationship and above all their demeanours when giving evidence. The veracity of the plaintiff's case rests mainly on the evidence of his three other brothers who stood in this dispute with the plaintiff against the defendant, her husband, Rokiah and another brother, Hussain. This state of relationship between the brothers was too obvious from the various court actions, arguments and even fist fights in which they were invariably involved in the past. I find that all the evidence of the three brothers (P.W.4, P.W.5 and P.W.7) were motivated either by an interest in the tenancy of the land itself or by sheer dislike for Jalil which P.W.4 had summed up in the following words

"I think Jalil was the aggressor in the fight. Because he used to scold us. Yes, including myself. Jalil used to scold us unfairly when he was in the wrong. Jalil used to bully us. I do not oppose him because I have respect for an elder brother."

Likewise, I placed the defendant and her husband's testimony under close scrutiny for the same reason. However, I found support for the defendant's case in Capt. Ali (D.W.1), a witness whose evidence appeared to me to be truthful and impartial. This witness had categorically stated that the land transaction was between his wife and the defendant. The witness was careful not to commit himself to one side or the other. This could clearly be seen by his use of such expression like "As far as I know . . . . I received the money but I do not know whether she paid the money from her own pockets or received from someone else." However in the course of his evidence he did say a few pertinent facts which in my opinion would further shift the balance of probability in favour of the defendant. For instance during his cross-examination in-chief he said:

"Nothing was said to me that the property was bought in trust for anybody. As far as I am aware, the defendant's husband, who was buying the land and putting it in the name of his wife. Fatimah is this lady (defendant identified). I was told the monthly instalment would be paid to me through Mustapha. This was because the husband of Fatimah was in Kedah at that time."

It is obvious from these words that the claim about plaintiff paying for the balance of $1,750 of the purchase price was never brought up with Capt. Ali at any time at all and that the balance of the money would be paid 'through' and not 'by' Mustapha.

There are other parts of his testimony which although indirectly spoken had added credence to the defendant's version. Towards the end of his cross-examination in-chief, D.W.1 said:

"I always had to see the Plaintiff because the instalments were not paid. When I did so he told me the money had not arrived. The money was to come from Kedah."

These uncontroverted evidence in my notes go a long way towards showing that instalment had come from the defendant's husband who was at that time in Kedah.

I have considered the whole of the plaintiff's case against that of the defendant and on the balance of probabilities I find that the plaintiff had not succeeded in showing to this Court that the land was purchased by the defendant with the intention of sharing one-third of its interest with the plaintiff.

I would therefore dismiss the plaintiff's claim with costs.

The final matter to be considered is the counterclaim by the defendant in respect of damages for wrongful entry of the private caveat on her land by the plaintiff. I agree that the defendant must have suffered some damages by this act but the appropriate measure of damages was not available to this Court. The evidence in this issue merely indicated the amount which a buyer, Ismail Yassin, was prepared to give for the same land in 1976. There was nothing to show anything else. There could not be wrongful occupation of the land because the original entry of the other brothers were with the consent of the plaintiff and even P.W.5 now remained on the land as a licensee whose licence to stay had not been revoked or terminated by any written or oral notice. I accept that the plaintiff's caveat resulted in a buyer abandoning the proposed sales but other than that, no evidence was introduced to show any diminution of the selling price or any actual loss suffered by the defendant. In *Wallington* v. *Townsend* [1] it was held that, where the plaintiff did not prove damages by way of loss of bargain, he is nevertheless entitled to loss of interest on any deposit paid and cost relating to the preparation of the contract but in our present case the defendant's evidence fell short of disclosing these requirements.

In view of this omission on the part of the defendant to proffer the necessary proof of actual damages I have to dismiss her counterclaim but in doing so I make no order as to costs.

Order accordingly.

Solicitor: *Kadir, Tan & Ramli.*

W v. H

[O.C.J. (Shankar J.) April 17, 1986]

[Johore Bahru – Originating Summon No. 170 of 1986]

Family Law – Custody – Separation deed – Welfare of infant – Civil Law Act, 1956, s. 27 – Courts of Judicature Act, 1964, ss. 23(2) & 24 – R.H.C. 1980, O. 18 r.2 – Guardianship of Infants Act, 1961, ss. 5 & 11 – Law Reform (Marriage and Divorce) Rules 1976, r. 60 – Law Reform (Marriage and Divorce) Act, 1976, ss. 88 – 97.

In this case the parties had a whirlwind courtship as a result of which a child was conceived. After an unsuccessful attempt to abort the child, the parties married. The marriage came under great strain and there was a quarrel in the house of the husband's parents. A separation deed